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SONG TEIK KIM v. LINA DIMBAD & ANOR

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
YAACOB MD SAM JCA
STEPHEN CHUNG JCA
B [CIVIL APPEAL NO: W-02(A)-2533-12-2017]
13 FEBRUARY 2019

LEGAL PROFESSION: *Disciplinary proceedings – Appeal against decision of Disciplinary Board ('DB') – Advocate and solicitor borrowed money from client but*
C *later ceased to pay sums borrowed – Client lodged complaint to Bar Council – Disciplinary Committee ('DC') found advocate and solicitor guilty of misconduct and recommended fine of RM1,000 – DB upheld decision of DC but increased fine to RM50,000 – Decision of DB affirmed by High Court upon appeal by advocate and solicitor – Whether DC made finding which was not subject matter of*
D *complaint at all – Whether DC had fallen into jurisdictional error – Whether there was evidence to support finding of undue influence – Whether penalty imposed by DB appropriate – Whether ought to be set aside – Legal Profession Act 1976, s. 94(3)*

LEGAL PROFESSION: *Professional discipline – Misconduct – Advocate and solicitor borrowed money from client but later ceased to pay sums borrowed –*
E *Whether friendly loan – Whether there was solicitor-client relationship when loan transaction took place – Whether advocate and solicitor advised client to seek independent advice of another advocate and solicitor regarding loan agreement – Whether advocate and solicitor guilty of conduct unbefitting solicitor – Legal Profession Act 1976, s. 94(3)*

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The appellant, who was previously practising as an advocate and solicitor, acted for the first respondent in the latter's insurance claim. The claim was settled and the settlement sum was subsequently paid. On instructions from the appellant, the respondent withdrew part of the settlement amounting to RM800,000 to be deposited into a bank account. The appellant then
G borrowed RM600,000 from the first respondent with a promise to pay her interest of RM6,400 a month. When the appellant ceased to pay the monthly interest, the first respondent lodged a complaint, against the appellant, to the second respondent. In its report, the Disciplinary Committee ('DC') appointed by the second respondent was of the view that (i) there was no
H solicitor-client relationship in existence as, at the time the sum of RM600,000 was paid to the appellant, the first respondent was no longer a client of the appellant; (ii) however, since the first respondent still relied on the appellant for advice in handling her monies, the appellant still had influence over the first respondent; and (iii) by failing to advise the first
I respondent to seek legal advice from another solicitor, before signing the loan

agreement, the appellant failed to conduct himself in a professional manner, knowing full well that there was a conflict of interest. The DC recommended to the Disciplinary Board ('DB') that the first respondent be fined a sum of RM1,000 for professional misconduct and the DB upheld the finding of misconduct but increased the fine to RM50,000. Aggrieved with the decision of the DB, the appellant filed an originating summons ('OS') at the High Court seeking the setting aside of (i) the decisions of the DB and/or the DC; and (ii) the penalty of the fine imposed. The High Court dismissed the OS and affirmed the decision of the DB. Hence, the present appeal. In support of his appeal, the appellant submitted that (i) the DC made a finding which was not the subject matter of the complaint at all and had fallen into a jurisdictional error; (ii) the DC failed to appreciate that there was no evidence to support the finding of undue influence which merited the appellant to require to advise that the first respondent needed to have independent advice; and (iii) the penalty imposed by the DB was inappropriate and ought to be set aside.

Held (dismissing appeal with no order as to costs)
Per Stephen Chung JCA delivering the judgment of the court:

(1) The appellant did not produce the loan agreement during the hearing before the DC. He said he could have misplaced the document while moving office. The appellant called it a 'friendly loan' because there was allegedly no interest provided in the loan agreement. If that was true, why did he pay interests to the first respondent? (para 31)

(2) The appellant had acted as solicitor for the first respondent since 1991. The first respondent was an illiterate housewife who would affix her thumbprint when she was required to sign documents. Since then, the first respondent, and her family, had come to rely and depend on the appellant for their legal and financial matters and advice. The first respondent was not advised by another lawyer for the loan agreement and the appellant did not tell them to seek advice from a different lawyer. (para 32)

(3) The solicitor-client relationship between the appellant and the first respondent for many years and the appellant's training and experience as a solicitor should have alerted him of a possible conflict of interest situation or of a complaint of taking unfair advantage of a former client. He should have advised her to seek separate independent advice instead of getting her to agree to the loan and to get her to sign the loan agreement without giving her an opportunity or time to think it over. Any right-thinking member of the Bar would not have asked nor taken the loan from her. (para 33)

(4) Section 94(3) of the Legal Profession Act 1976 defines 'misconduct' to mean 'conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety'. It has been held that this definition is wide enough to include acts and omissions in any capacity other than as an advocate and solicitor. The appellant was found guilty of conduct unbefitting a solicitor. Therefore, the DC was correct in its finding. (para 35)

(5) The DC, being a collegiate of peers, must be allowed to make findings of facts based on their experience in the profession under any given circumstances and the court must not substitute itself in the position of the DC in its appellate role. The court should only interfere with the finding of facts and recommendations of the DC: (i) when the findings were manifestly perverse; (ii) the DC/DB failed, as right-thinking members of the Bar, to give due consideration to the facts of the case and the conduct of the solicitor complained against; and (iii) there had been a breach of natural justice. In this appeal, the appellant did not complain of any breach of natural justice or unfairness in the proceedings. There was no reason to intervene on the findings of the DC/DB and the decision of the High Court. (paras 36 & 37)

(6) The sentence imposed was in accordance with the principle of proportionality and appropriate to the facts and circumstances of the case, taking into account: (i) the role of the appellant; (ii) the first respondent being an illiterate housewife; (iii) their solicitor-client relationship for many years; (iv) the trust by the first respondent on the appellant; (v) the huge sum of money involved; and (vi) the failure by the appellant to act with integrity and propriety. There was no reason to disturb the fine imposed. (para 40)

Bahasa Malaysia *Headnotes*

Perayu, yang dahulu beramal sebagai peguam bela dan peguam cara, mewakili responden pertama dalam tuntutan insuransnya. Tuntutan ini selesai dan jumlah penyelesaian seterusnya dibayar. Atas arahan perayu, responden mengeluarkan sebahagian wang penyelesaian berjumlah RM800,000 untuk didepositkan ke dalam akaun bank. Perayu kemudian meminjam RM600,000 daripada responden pertama dan berjanji membayar faedah kepadanya sebanyak RM6,400 sebulan. Apabila perayu gagal membayar faedah bulanan tersebut, responden pertama membuat aduan terhadap perayu, pada responden kedua. Dalam laporannya, Jawatankuasa Tatatertib ('JT') yang ditubuhkan oleh responden kedua berpendapat (i) hubungan peguam cara-anak guam tidak wujud kerana, semasa jumlah RM600,000 dibayar kepada perayu, responden pertama bukan lagi anak

guam perayu; (ii) walau bagaimanapun, oleh kerana responden pertama masih bergantung pada perayu untuk mendapatkan nasihat dalam pengendalian wangnya, perayu masih mempunyai pengaruh atas responden pertama; dan (iii) akibat gagal menasihatkan responden pertama agar meminta nasihat guaman daripada peguam cara lain sebelum menandatangani perjanjian pinjaman tersebut, perayu gagal mengendalikan dirinya secara profesional, sedangkan dia tahu wujud percanggahan kepentingan. Jawatankuasa Tatatertib mencadangkan kepada Lembaga Tatatertib ('LT') agar responden pertama dikenakan denda RM1,000 atas salah laku profesional dan LT mengesahkan dapatan salah laku tetapi meningkatkan denda menjadi RM50,000. Terkilan dengan keputusan LT, perayu memfailkan satu saman pemula ('SP') di Mahkamah Tinggi memohon pengetepian (i) keputusan JT dan/atau LT; dan (ii) hukuman denda yang dikenakan. Mahkamah Tinggi menolak SP dan mengesahkan keputusan LT. Maka timbul rayuan ini. Menyokong rayuannya, perayu menghujahkan (i) JT membuat dapatan yang sama sekali bukan hal perkara aduan dan melakukan kekhilafan bidang kuasa; (ii) JT gagal mempertimbangkan bahawa tiada keterangan yang menyokong dapatan pengaruh tidak wajar yang mewajarkan perayu menasihatkan responden pertama bahawa dia memerlukan nasihat bebas; dan (iii) hukuman yang dikenakan oleh LT tidak sesuai dan harus diketepikan.

Diputuskan (menolak rayuan tanpa perintah untuk kos)
Oleh Stephen Chung HMR menyampaikan penghakiman mahkamah:

(1) Perayu tidak mengemukakan perjanjian pinjaman ketika perbicaraan JT. Dia menyatakan mungkin tersalah letak dokumen tersebut ketika berpindah pejabat. Perayu memanggilnya 'pinjaman persahabatan' kerana tiada faedah yang diperuntukkan dalam perjanjian pinjaman tersebut. Jika ini benar, mengapa dia membayar faedah kepada responden pertama?

(2) Perayu bertindak sebagai peguam cara buat responden pertama sejak 1991. Responden pertama seorang suri rumah buta huruf yang akan menurunkan cap jarinya apabila dia perlu menandatangani dokumen-dokumen. Sejak itu, responden pertama, dan keluarganya, bergantung dan berharap pada perayu dalam hal-hal dan nasihat guaman dan kewangan. Responden pertama tidak dinasihati oleh peguam lain untuk perjanjian pinjaman tersebut dan perayu tidak menasihatinya agar mendapatkan nasihat peguam lain.

(3) Hubungan peguam cara-anak guam antara perayu dan responden pertama bertahun-tahun lamanya dan amalan dan pengalaman perayu sebagai peguam cara sepatutnya menyedarkan dia akan kemungkinan situasi percanggahan kepentingan atau aduan tentang ambilan kesempatan secara tidak adil terhadap bekas anak guam. Dia sepatutnya

menasihatkan responden pertama agar mendapatkan nasihat bebas berasingan dan bukan memintanya bersetuju dengan pinjaman tersebut dan memintanya menandatangani perjanjian pinjaman tanpa memberinya peluang berfikir dahulu. Mana-mana ahli Majlis Peguam yang berfikiran wajar tidak akan meminta atau mengambil pinjaman daripadanya.

(4) Seksyen 94(3) Akta Profesion Undang-undang 1976 mentakrifkan 'salah laku' sebagai 'kelakuan atau ketinggalan untuk bertindak di Malaysia atau di tempat lain oleh seseorang peguam bela dan peguam cara atas sifat profesionalnya atau selainnya yang dikira sebagai perbuatan tidak patut'. Sudah diputuskan bahawa takrifan ini cukup luas untuk melibatkan kelakuan dan ketinggalan dalam apa-apa kapasiti selain sebagai peguam bela dan peguam cara. Perayu didapati bersalah atas salah laku yang tidak sesuai sebagai peguam cara. Oleh itu, JT bertindak betul dalam dapatannya.

(5) Jawatankuasa Tatatertib, sebagai segolongan rakan sejawat, mesti dibenarkan membuat dapatan fakta berdasarkan pengalaman mereka dalam profesion tersebut berdasarkan apa-apa hal keadaan dan mahkamah, dalam menjalankan peranan rayuannya, tidak harus mengambil ganti kedudukan sebagai JT. Mahkamah harus campur tangan dalam dapatan fakta dan cadangan JT hanya apabila: (i) dapatan-dapatan tersebut terlampau tidak munasabah; (ii) JT/LT gagal, sebagai ahli Majlis Peguam yang berfikiran wajar, memberi pertimbangan pada fakta kes dan kelakuan peguam cara yang diadukan; dan (iii) berlaku pencabulan keadilan asasi. Dalam rayuan ini, perayu tidak mengadu tentang pencabulan keadilan asasi atau ketidakadilan dalam prosiding. Tiada alasan untuk campur tangan dalam dapatan-dapatan JT/LT dan keputusan Mahkamah Tinggi.

(6) Hukuman yang dikenakan sejajar dengan prinsip keseimbangan dan kesesuaian fakta dan hal keadaan kes, mengambil kira: (i) peranan perayu; (ii) responden pertama seorang suri rumah yang buta huruf; (iii) hubungan peguam cara-anak guam mereka yang sudah bertahun-tahun lamanya; (iv) kepercayaan responden pertama pada perayu; (v) penglibatan jumlah wang yang besar; dan (vi) kegagalan perayu bertindak dengan integriti dan kesesuaian.

Case(s) referred to:

Bar Malaysia v. Neasarani T Singara Thevar & Anor [2015] 8 CLJ 634 CA ***(refd)***

Bolton v. Law Society [1994] 2 All ER 486 ***(refd)***

Dinesh Kanavaji Kanawagi & Anor v. Ragumaren N Gopal; Bar Council Malaysia (Intervener) [2016] 7 CLJ 667 CA ***(refd)***

Majlis Peguam Malaysia v. Hari Krishnan Jeyapalan [2017] 4 CLJ 225 CA ***(refd)***

Majlis Peguam Malaysia v. Rajehgopal Velu & Anor [2017] 2 CLJ 493 FC ***(refd)***

R Sivabalan A Ramiah v. Neoh Lay Cheng; Malaysian Bar Council (Intervener) [2016] 5 CLJ 313 HC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 94(3), (4), 100(1)(a), (3)(a), (7), (8), 103C(1)(c), 103D(1), (2), 103E(1), (5)

For the appellant - Harpal Singh Grewal & Nahvinah Selvaraj; M/s AJ Ariffin Yeo & Harpal
For 2nd respondent - Colin Andrew Pereira & Quah Kai Weng

[Editor's note: For the High Court judgment, please see Song Teik Kim v. Lina Dimbad; Majlis Peguam Malaysia (Intervener) & Another Application [2019] 1 CLJ 554 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Stephen Chung JCA:

Background Facts: Before The Disciplinary Board

[1] The appellant was previously practising as an advocate and solicitor under the name and style of Messrs Murthy Song & Partners, Kuala Lumpur.

[2] The appellant acted for the first respondent as solicitor in her insurance claim arising from the death of her late husband. The claim was settled and the settlement sum was paid to Universal Trustee (Malaysia) Berhad. On instructions from the appellant, the respondent withdrew part of the settlement sum amounting to RM800,000 to be deposited into a bank account.

[3] The appellant then borrowed RM600,000 from the first respondent with a promise to pay her interest of RM6,400 a month commencing April 2005. The appellant confirmed that he took the loan and had paid interest and refunded a sum of RM100,000 when requested but ceased to pay monthly interest from August 2008 as he had financial difficulties.

[4] In June 2010, the first respondent lodged a complaint against the appellant under the Legal Profession Act 1976 after he stopped paying and still owed the principal sum of RM500,000. The Majlis Peguam Malaysia (Bar Council) appointed a Discipline Committee (DC) to hear the complaint. After hearing the parties, the documentary evidence and submissions, the DC furnished a report.

[5] In its recommendations in the report, the DC was of the view that at the time the sum of RM600,000 was paid to the appellant, the first respondent was no longer a client of the appellant, hence there was no solicitor-client relationship in existence. Nevertheless bearing in mind that the first respondent still relied on the appellant for advice in handling her monies, the appellant still had influence over the first respondent and the

A appellant should have asked her to obtain legal advice from another solicitor before entering into the loan agreement. By failing to ask the first respondent to seek legal advice before signing the loan agreement, the appellant had failed to conduct himself in a professional manner, knowing full well that there was a conflict of interest since he was a borrower and at the same time
B a former solicitor to the first respondent who had trusted him. Nonetheless, failure to repay the loan was a purely civil matter which the first respondent had to seek recourse through the court.

[6] The DC recommended to the Disciplinary Board (DB) that the appellant be fined a sum of RM1,000 for professional misconduct in failing
C to advise the first respondent to seek legal advice before signing the loan agreement. The DB upheld the finding of misconduct but increased the fine to RM50,000.

In The High Court

D **[7]** Being aggrieved with the decision of the DB, the appellant filed an originating summons (OS) for the following orders that (i) the decision in order of the Disciplinary Board and/or the Disciplinary Committee against the plaintiff/appellant on 15 April 2017 be set aside; and (ii) that the penalty of the fine of RM50,000 be set aside.

E **[8]** The grounds for the OS application were as follows: (i) The DC and/or DB in deciding that the appellant ought to have advised the first respondent to seek independent advice was never a complaint to the DB. (ii) It was not open to the DB to undertake an enquiry on matters which were not the subject matter of the complaint. (iii) The appellant was not given any
F opportunity to explain as to why he was not required to proffer unsolicited advice to the first respondent before she signed the loan agreement. (iv) The DB had acted disproportionately to the nature of the complaints and in all circumstances of the case when imposing a fine of RM50,000. (v) There had been a breach of the rules of natural justice.

G **[9]** In her decision, after referring to the facts of the case, the learned High Court Judge was of the opinion that the appellant's main complaint was that by substituting a fresh act of misconduct from the original charge that the DC had committed a jurisdictional error. Therefore she posed the question whether the DC had made a finding of misconduct that were within the scope
H of the respondent's complaint as they arose from facts based on the complaint which were not disputed by the appellant.

[10] The learned High Court Judge found that on the undisputed fact that when the appellant prepared the loan agreement with the first respondent, he did not advise the first respondent to seek advice from a different lawyer. She
I said even though the first respondent did not state this clearly in her letter of complaint, she was not expected to do so as she was not a legally qualified

person. On the other hand, the appellant as the legally qualified person, should have known this and that he should have advised her to seek advice from a different lawyer. She went on to say that from his evidence before the DC, the appellant was equally appraised of this fact, but his excuse was that the first respondent's "son-in-law could understand the transaction". A

[11] The learned High Court Judge was of the considered opinion that since the DC had made a finding of misconduct that were within the scope of the first respondent's complaint as they arose from facts based on the complaint, which were not disputed by the appellant, the DC could not be said to have acted beyond its jurisdiction and consequently, in affirming the DC's finding on liability, the DB could not be said to be acting without jurisdiction. B C

[12] The learned High Court Judge further stated that from the documents and the notes of evidence before the DC, she found that the appellant had been informed of all the material ingredients and facts relating to the complaint lodged against him and he had given his explanation to exculpate himself. However, the DC did not accept his explanation and this was affirmed by the DB. D

[13] The learned High Court Judge said that as to whether the DC and DB had erred in rejecting his explanation was not for the court to consider, as the court should not delve into the merits of the said order made by the DC and the DB, referring to the Court of Appeal's case of *Dinesh Kanavaji & Anor v. Ragumeran N Gopal; Bar Council Malaysia (Intervener)* [2016] 7 CLJ 667. On the issue of proportionality of the sentence, she said this was within the discretion of the DB which this court would not interfere. E

[14] The learned High Court Judge then proceeded to find no merit in the appellant's appeal and dismissed his appeal with no costs. Hence the appeal before us. F

The Appeal

The Appellant's Submission G

[15] Counsel for the appellant submitted that the DC's recommendation in paras. 2 and 3 was that the appellant had influence over the first respondent and ought to have asked the first respondent to seek independent advice. This recommendation was not the subject matter of the complaint at all. The first respondent had accepted the loan transaction and it was the non-payment which was an issue. There was no challenge by the first respondent to the appellant's explanation by way of cross-examination and neither did the first respondent registered any protest against the issue of influence or independent advice. There was no cross-examination of the first respondent save and except that she wanted the appellant to return the money which is still owing plus interests. H I

A **[16]** The appellant submitted that the loan agreement was not challenged before the DC or in any court, and consequently the relationship of the parties was that of a debtor and creditor. It was submitted that the DC recognised that the transaction was a loan and was purely a civil matter and the first respondent has to seek recourse through the court.

B **[17]** It was submitted that the DC fell into error when it held that the appellant was guilty of misconduct for not having asked the first respondent to seek legal advice from another solicitor as it had already come to a finding that there was no solicitor-client relationship in existence and that the failure to repay the loan was purely a civil matter which the first respondent had C to seek recourse through the court which meant that effectively the complaint by the first respondent did not amount to misconduct. By substituting a fresh charge of misconduct for the original charge, the DC committed a jurisdictional error. The appellant cited *R Sivabalan A Ramiah v. Neoh Lay Cheng; Malaysian Bar Council (Intervener)* [2016] 5 CLJ 313; [2017] 7 MLJ D 587 and *Bar Malaysia v. Neasarani T Singara Thevar & Anor* [2015] 8 CLJ 634; [2016] 1 MLRA 120.

[18] It was submitted that the case of *Majlis Peguam Malaysia v. Rajehgopal Velu & Anor* [2017] 2 CLJ 493; [2017] 1 MLJ 596 was not applicable to the facts in the instant case because there was no complaint of any undue E influence or breach of confidence reposed in the appellant by the first respondent and neither was there any evidence led by her to say that she was influenced to sign the loan agreement to grant the loan to the appellant.

[19] In respect of the penalty, the DC recommended that a penalty of RM1,000 be imposed however the DB increased the said sum to RM50,000. F It was submitted that the sum of RM50,000 was excessive and ought to be set aside given the factual matrix of the case and the conduct of the first respondent as follows:

(i) the loan transaction was not challenged and it remains a valid contract between the parties;

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(ii) there was nothing in the complaint or evidence that the appellant had exercised any undue influence on the first respondent;

(iii) the first respondent was advised by son-in-laws and the loan was given two days after the request for it by the appellant;

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(iv) the first respondent's present husband, daughter and relatives numbering at least four to five persons were present in the dealings between the appellant and the first respondent; and

(v) the complainant was paid interests amounting to RM210,400.

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Submission By The Second Respondent

[20] The second respondent submitted that it was not disputed that the appellant was afforded the opportunity to provide his explanation to both the DC and DB and no procedural unfairness had been alleged by the appellant. It was not disputed that the appellant had in fact attended the hearing of the DB and was afforded the opportunity to raise any issues he deemed fit.

[21] It was submitted that the question was whether the appellant had acted in a manner unbecoming of an advocate and solicitor when he obtained the loan from the first respondent without ensuring that she obtained independent legal advice. It was submitted that whenever a solicitor is put in a position in which his own interest conflicts with that of his client, he must advise his client to seek independent legal advice. The failure to advise the first respondent as such was a clear dereliction of duty.

[22] It was submitted that the only way the appellant could have known that the first respondent was in a position to lend him such a vast amount of money was because he was the solicitor acting for the first respondent at the time the first respondent was paid the settlement sum. This information had been procured by the appellant as solicitor for the first respondent.

[23] It was submitted that the DB did not err when it upheld the findings of the DC. Furthermore, the DB had acted well within its jurisdiction and discretion in increasing the fine imposed on the appellant to RM50,000.

[24] It was further submitted that the learned High Court Judge was correct in refraining from disturbing the findings of the DC and the DB and in refraining from varying the sanction imposed.

Our Decision

[25] Under s. 103D(1) of LPA, the DB may make an order affirming or rejecting the finding or recommendation of the DC. Pursuant to s. 103D(2), the DB may, in appropriate cases impose a greater or lesser penalty or punishment than that recommended by the DC. In this case, the DB had affirmed the finding of the DC but imposed a penalty of RM50,000 which was greater than the penalty of RM1,000 recommended by the DC. On appeal to the High Court, the learned High Court Judge affirmed the decision of the DB.

[26] Pursuant to s. 103E(1) of LPA, any party aggrieved by any final order or decision made by the DB (a) pursuant to sub-s. 94(4); (b) under para. 100(1)(a), (3)(a) or sub-s. 100(7) or (8); or (c) under s. 103D, shall have the right to appeal to the High Court within a month of the receipt of the notification of that order or decision. Under sub-s. (5), any appeal against the decision of the High Court shall lie to the Court of Appeal and thereafter to the Federal Court.

[27] In this appeal, learned counsel for the appellant submitted three grounds of appeal: (i) that the DC had made a finding which was not the subject matter of the complaint at all and had fallen into a jurisdictional error; (ii) that the DC failed to appreciate that there was no evidence to support the finding of undue influence which merited the appellant to require to advise that the first respondent need to have independent advice; and (iii) that the punishment imposed by the DB was inappropriate and ought to be set aside.

[28] We referred to the record of appeal. In her letter of complaint dated 28 September 2010, the first respondent stated that on 2 March 2005 the appellant wrote on her behalf to Universal Trustee to withdraw RM800,000 from the Jawing anak Jagit account (the first respondent's late husband's account) and Universal Trustee paid this sum via an SCB cheque 106349 which was deposited into her Hong Leong Bank account on 9 March 2005. The first respondent stated that the appellant then advised her to withdraw RM690,000 from her account to be kept by the appellant, out of which RM90,000 would be given to her to bring back to Sarawak and the balance of RM600,000 to be kept by the appellant. She said the appellant promised her that whatever dividend from the said sum would be paid to her. She said she agreed to go with the appellant to a bank to deposit or invest the money. From April 2005 until July 2006, the appellant deposited RM6,400 per month into her account as dividend. After she asked for repayment of RM100,000 in August 2006, the appellant deposited RM5,400 as dividend per month until April 2008. After that, she did not receive any more dividend from the appellant and that the appellant still owed RM500,000.

[29] In his explanation to the DB, dated 6 March 2012, the appellant said that the instructions to withdraw the sum of RM800,000 from Universal Trustee was done on the complainant's and/or her agent's express request because they complained of the complexity of calculation of low interest, irregular payment of interest and high service and management charges imposed by Universal Trustee. In the next paragraph, he said the complainant and her agents decided to lend him the sum of RM600,000 on a personal basis at an agreed monthly interest rate of RM6,400. He said a friendly loan agreement was then prepared, executed on 11 March 2005 and a copy extended to them. He said at no material time did he take undue advantage and/or misrepresented, misled, cheated or a trustee to the complainant.

[30] Although the appellant asserted that the first respondent decided to lend him a personal loan of RM600,000 and it was a friendly loan, based on an RHB Bank deposit slip dated 11 March 2005, a sum of RM636,000 was deposited into an account of Murthy Song & Partners and not into his personal account. After she was shown the explanation letter of the appellant, the first respondent wrote a letter to the DB, dated 13 March 2012, stating that, as far as she knew, she had never seen and did not know of the loan agreement.

[31] Based on the notes of hearing on 4 November 2014 at 2.30pm before the DC, the appellant did not produce the loan agreement. He explained that he tried to locate the loan agreement but despite his efforts he had not been able to do so. He said he could have misplaced the document while moving office. He called it a friendly loan because there was no interest provided in the agreement. If that was true, why did he pay interests to the first respondent? All these raised questions in our minds about the so-called friendly loan and what actually transpired on that day.

[32] It was not in dispute that since 1991 the appellant had acted as solicitor for the first respondent in her negligence claim against insurers of a barge which sank in the sea and her husband died in that accident. In 1992, there was an out of court settlement and the first respondent received RM1.8 million which was paid into her SCB account. The first respondent is a housewife from Sarawak. The appellant confirmed that she is illiterate and affixed her thumbprint when she was required to sign documents. Since then, the first respondent and her family had come to rely and depend on the appellant for their legal and financial matters and advice. The appellant also confirmed that the first respondent was not advised by another lawyer for the loan transaction and he did not tell them to seek advice from a different lawyer because her son-in-law could understand the transaction.

[33] Based on the factual matrix, their solicitor-client relationship for many years, and his training and experience as a solicitor, these should have alerted the appellant of a possible conflict of interest situation or of a complaint of taking unfair advantage of a former client and he should have advised her to seek separate independent advice instead of getting her to agree to the loan and to get her to sign the loan agreement without giving her an opportunity or time to think it over. Any right-thinking member of the Bar in the circumstances would not have asked nor taken the loan from her.

[34] In her letter dated 28 September 2010, the first respondent complained that the appellant advised her to withdraw RM690,000. She used the words "… Peguam Song Teik Kim nasihatkan saya untuk keluarkan RM690,000 daripada akaun Hong Leong Bank saya untuk disimpan oleh beliau". Although not in exact words, the appellant understood and knew of the complaint and it was telling in his reply that he said "At no material time, did I take undue advantage and/or misrepresented, misled cheated or a trustee to the complainant." The DC was entitled to rely on the documents before it to come to its findings.

[35] On the facts, these answered the appellant's submission that he had no influence over the first respondent and that there was no requirement to ask her to seek independent advice. These were within the ambit of the complaint. Section 94(3) of LPA defines "misconduct" to mean "conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety". It has been held that this definition is wide enough to include acts and

omissions in any capacity other than as an advocate and solicitor. The appellant was found guilty of conduct unbefitting a solicitor. Therefore the DC was correct in its finding.

[36] The DC being a collegiate of peers must be allowed to make findings of facts based on their experience in the profession under any given circumstances and the court must not substitute itself in the position of the DC in its appellate role. The apex court held that the court should only interfere with the finding of facts and recommendations of the DC: (i) when the findings were manifestly perverse; (ii) the DC/DB had failed as right-thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and (iii) there had been a breach of natural justice: *Dinesh Kanavaji a/l Kanawagi & Anor v. Ragumaren a/l N Gopal (Majlis Peguam, intervener) supra.*

[37] In this appeal, the appellant did not complain of any breach of natural justice or unfairness in the proceedings and the DC/DB and the High Court had dealt with this. On the facts and submissions before us, there was no reason to intervene on the findings of the DC/DB and the decision of the High Court.

[38] Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed by the DC/DB: see *Bolton v. Law Society* [1994] 2 All ER 486. The fine of RM50,000 imposed by the DB was lawful and within s. 103D(2) of the LPA.

[39] Section 103C(1)(c) provides for the following possible penalties or punishments by the DC: (i) reprimand or censure; (ii) imposition of a fine not exceeding fifty thousand ringgit; (iii) suspension from practice; or (iv) striking out the advocate and solicitor off the Roll. This subsection provides a scale from the lowest to the maximum penalties or punishments. In this case, the appellant was not suspended from practice nor was he struck off the Roll. There was also no order of restitution.

[40] Notwithstanding the fact that the DB did not give any written grounds, on the factual matrix of the case, the role of the appellant, the first respondent being an illiterate housewife, their solicitor-client relationship for many years, the trust by the first respondent on the appellant, the huge sum of money involved and the failure by the appellant to act with integrity and propriety, the sentence imposed was in accordance with the principle of proportionality and appropriate to the facts and circumstances of the case: see *Majlis Peguam Malaysia v. Hari Krishnan Jeyapalan* [2017] 4 CLJ 225; [2017] 1 MLJ 770. There was no reason to disturb the fine imposed.

[41] As there were no merits in the appeal, the appeal was dismissed without costs. Deposit was ordered to be refunded.